Supreme Court, U.S.
FILED

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No. 03-

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM MICHAEL STRUBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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February 2004

QUESTION PRESENTED

When in the course of deciding a federal criminal appeal a court of appeals panel declares -- addressing a question not presented -- that certain defenses were not available to the defendant, is that declaration binding in the disposition of a subsequent § 2255 motion which alleges that counsel rendered ineffective assistance in not researching and developing those alternate defenses?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Strube and respondent United States). Petitioner's co-defendant, Richard L. Pitt, also filed a § 2255 motion, which was denied separately. He was then refused a certificate of appealability, and did not apply to this Court for certiorari.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W. Michael Strube respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the denial of his motion to vacate sentence under 28 U.S.C. § 2255.

OPINIONS BELOW

The Third Circuit's non-precedential Opinion (per Fuentes, J., with Roth and Barry, JJ.), was filed May 30, 2003; see *United States v. Strube*, 65 Fed.Appx. 865, 2003 WL 21246540. A copy is attached as Appendix A. The United States District Court for the Middle District of Pennsylvania (Rambo, J.) wrote an opinion, filed July 24, 2001, denying the motion, which is not published. A copy is Appendix B. The opinion of the Third Circuit on direct appeal is published *sub nom. United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999).[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the denial of petitioner's motion to vacate sentence under 28 U.S.C. § 2255 was filed and entered on May 30, 2003. Appx. A. The applicant's timely petition for rehearing was

[1] Petitioner did not seek certiorari from this Court to review the affirmance of his conviction.

denied by the Third Circuit on September 17, 2003. Appx. C. By Order dated December 8, 2003, under No. 03A482, Justice Souter extended until Saturday, February 14, 2004, the time for filing a petition for a writ of certiorari in this case. This petition is being filed by postmark on the first business day following that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE INVOLVED

The first and second unnumbered paragraphs of section 2255 of title 28, U.S. Code, provide, in pertinent part:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence ... is ... subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or [is] otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the

prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * *

28 U.S.C. § 2255.

STATEMENT OF THE CASE

This petition presents important and recurring questions concerning the authority of a district court to limit, by a local rule of procedure, the power of a United States Court of Appeals to consider an issue on appeal after trial, and the extent of the power vested in a United States Magistrate Judge when a nondispositive pretrial matter is referred to that jurist "to hear and determine."

a. *Procedural History*

Petitioner W. Michael Strube was convicted after a two-defendant, nine-day jury trial in the Middle District of Pennsylvania on a five-count indictment charging offenses related to distribution of cocaine, and money laundering. 21 U.S.C. §§ 841(b), 846; 18 U.S.C. § 1956(h). He was sentenced to serve 30 years' imprisonment. On appeal, joined with his co-defendant Richard Pitt, he raised several issues, one of which was the trial court's disallowance of his defense of "apparent authority." The government easily persuaded the Third Circuit to denounce the defense theory, as proposed at trial, as erroneous in every possible way. *See* Appx. D5-

13; *United States v. Pitt*, 193 F.3d 751, 755-58 (3d Cir. 1999) (per Dowd, U.S.D.J., N.D.Oh., with Greenberg & Alito, JJ.). The court of appeals further declared that petitioner had waived any defense of entrapment by estoppel or of outrageous government conduct by failing to advance it at trial, but that in any event, for various reasons, he could not make out either defense. *Id.* 758-62. The panel also held that defense counsel had waived any defense of lack of venue. *Id.* 762; Appx. D6-21.

Petitioner filed a timely motion under 28 U.S.C. § 2255 to vacate his conviction and sentence, alleging ineffective assistance of trial counsel and other issues. The district court allowed him to take the deposition of trial counsel, and to argue on that basis, but denied any further hearing. Nevertheless, petitioner demonstrated how he was deprived of the effective assistance of counsel at trial, when his attorney staked the entire defense on a theory that was legally erroneous and factually unsupportable. The § 2255 motion also averred that outrageous government conduct could have been made out if raised by proper pretrial motion, and that counsel was ineffective in failing to challenge venue as a factual matter at trial.

Relief was denied in an unpublished memorandum and order. Appx. B. Judge Rambo held:

> Until the Third Circuit Court of Appeals ruled [in Mr. Strube's direct appeal] that public authority means actual authority from an appropriate government agent, trial counsel had no reason not to present the defense. Eliminating the distorting effects of hindsight, this court cannot find that trial

> counsel's strategy fell below an objective standard of reasonableness in using this defense.

Appx. B6. The lower court went so far as to say that "without a definitive [prior] ruling by the Third Circuit, trial counsel may have been ineffective if he had not pursued this defense." *Id.* As to petitioner's suggestions that alternative lines of defense were sounder, Judge Rambo ruled that outrageous governmental conduct and entrapment by estoppel were unavailable defenses in this case on the basis that the decision on direct appeal had conclusively so held. Appx. B4. The district court also found that trial counsel had a sound strategic reason to decline to pursue a conventional entrapment defense. *Id.* Finally, Judge Rambo suggested that simply putting the government to its proof would have been arguably "incompetent" and tantamount to "not raising a defense," as the evidence was "overwhelming." Appx. B5. In short, according to the court below, "Looking at the situation objectively, trial counsel could proceed as he did, or have Strube plead guilty." *Id.*

On reconsideration, the district court granted petitioner a certificate of appealability under *id.* § 2253(c). On appeal, petitioner showed how his counsel's reliance on an "apparent authority" defense was doomed for two reasons. First, counsel's formulation of that defense lacked precedential support. Second, even as proposed, it lacked support in any view the jury might take of the evidence.

Rejecting the § 2255 appeal, the court below characterized the trial defense as effective, because counsel:

> advised [the defendant] of available defenses, discussed them with [the co-defendant's] attorneys, researched the various defenses, consulted [petitioner] about the different strategies, and ultimately decided to pursue the apparent public authority defense, which involves undeniably complex analyses of fact and law. In other words, counsel made a reasoned, strategic decision which cannot be construed as so deficient that it undermined the proper functioning of the adversary process. Strickland v. Washington, 466 U.S. 668, 686 (1984).

Appx. A3-4. This assessment is totally unsupportable on any view of the proceedings in the district court. If certiorari is granted, petitioner will establish its inaccuracy, and thus his right to proceed to a decision of the question presented on a fair reading of the post-conviction record. He does not seek this Court's intervention for that reason alone, however. Rather, the reason for granting the writ arises out of the second ground asserted by the court below:

> Furthermore, Strube cannot establish prejudice when this Court has already determined that his alternate defenses -- entrapment by estoppel and outrageous conduct by the Government -- would not have been available to him. See Pitt, 193 F.3d at 758-62.

Appx. A-4. Because this rationale departs utterly from this Court's teachings on the relationship of a direct appeal to a post-conviction challenge, petitioner seeks this Court's review.

b. *Statement of Facts*

On direct appeal, the Third Circuit summarized the evidence as follows:

> Richard Pitt, a pilot and a smuggler by trade, enlisted as a documented confidential informant with the U.S. Customs Service in 1992 after his release from a Mexican prison based on a sentence arising from flying a load of cocaine into Mexico from Colombia. In 1993, Pitt brokered a deal between an undercover Customs agent and a group of Mexicans to buy $1.3 million worth of cocaine. The reverse sting was successful and $1.3 million was seized, with Pitt receiving $350,000 for his efforts.
>
> While still working with U.S. Customs Special Agents Roger Bower and Chuck Mohle, Pitt conceived a plan to entice the Cali Cartel to hire him to transport a large quantity of cocaine by an ocean-going vessel. Pitt enlisted Strube in that plan [as ship captain,] and they acquired the Ridgely Warfield for that avowed purpose. Agents Bower and Mohle were advised on the Pitt-Strube plan. However, Pitt and Strube did not advise the Customs agents that, in the summer of 1994, they were receiving and transporting large shipments of cocaine from Los Angeles to New York. [Pitt testified and explained that he undertook these shipments at the behest of his Colombian contacts to prove to them he was not working with the

U.S. authorities, so they would trust him to go through with the mammoth Ridgely Warfield sting operation.]

The first shipment of 150 kilograms took place in mid-July; the second shipment of 150 kilograms took place in early August of 1994. A California State police officer intercepted the third shipment of 186 kilograms destined for New York in a vehicle driven by Pitt. Information about the third shipment was obtained by an on-going Title III interception; however, the stop of [the] vehicle was made for the ostensible reason of a traffic violation so as [to] avoid any revelation about the Title III operation. The traffic stop led to the seizure of the 186 kilograms in the third shipment.

During the government's case in chief, persuasive ... testimony was produced which demonstrated the culpability of Pitt and Strube relating to the first two shipments of cocaine to New York, including the testimony of Pitt's relatives who had been involved in the operation. The recipient of the cocaine in New York, Gloria Ramirez, also testified and accounted for the large sums of cash that were subsequently delivered to Pitt and Strube in payment for the earlier shipments.

The government produced Customs Agents Bower and Mohle who offered extensive testimony about their relationship with Pitt as

a documented confidential informant for Customs. They conceded that Pitt had outlined his plan to persuade the Cali Cartel to use the seagoing vessel Ridgely Warfield, to transport cocaine to the United States for seizure. However, they denied any advance information about the Pitt-Strube plan to ship the 468 kilograms of cocaine to New York from Los Angeles. They also insisted that Pitt had been advised by his separate contacts that he was not authorized to engage in criminal conduct as a part of his plan. Pitt also testified at length about his contact with Bower and Mohle and suggested that they had agreed inferentially with criminal conduct to bring about the anticipated large shipment of cocaine by use of [a] sea-going vessel.

In ruling on the Pitt motion for a new trial, the district court summarized his testimony as follows:

> ... Defendant himself admitted that no one had told him he could sell cocaine for profit. (Trial Transcript ("Tr.") at 1218.) He also acknowledged that he knew it was against U.S. Customs' policy to let drugs "walk" and, therefore, [that he] could not get official approval for his operation. (Tr. at 869.[2]) In fact, he

[2] To "let drugs walk" is to engage in an undercover operation which ends with the drugs' not being seized but rather going into or remaining in the control of actual drug dealers, allowing the drugs eventually to get into the hands of users.

> admitted hesitating in carrying out his plan once he was requested by the Cali Cartel to make three test runs[,] because he knew it was wrong. (Tr. at 1201.) Further, he did not tell agents Bowers and Mohle the full extent of his plan until after he was arrested. (Tr. at 1181.) Additionally, there was testimony from the agents that they never authorized Defendant to distribute cocaine and that Defendant had been told in the past this could not be done ....

Appx. D3-4; *United States v. Pitt*, 193 F.3d at 754-55.

The court of appeals' opinion did not address what evidence there was, if any, that petitioner Strube was privy to what Pitt knew or thought about the distinction between the authorized and unauthorized operations. Nor did the opinion address either the real or the apparent extent of Pitt's authority as a "documented confidential informant" to enlist other civilians in his activities.

In the deposition of trial counsel, this Pittsburgh attorney revealed that he relied almost exclusively on the advice of an attorney from Florida, who previously had represented the co-defendant Pitt, about raising the public authority defense. CA3 App. 137-39.[3] Trial

[3] That attorney advised petitioner's co-defendant before indictment, and represented Pitt in a related state case in California. The attorney also admitted having received proceeds from the controverted drug deal; he may even have had knowledge of their nature, given that he filed (in seeming reliance on Pitt's "apparent public authority") an IRS Form

counsel admitted that he knew then (and still knew) of no appellate precedent allowing that defense to be predicated on mere "apparent authority" of lower-level government agents, much less the "apparent authority" of an informant, rather than actual authority from a high-ranking agency official. CA3 App. 146-47. Prior counsel testified that he had not considered the defenses of entrapment by estoppel or outrageous government conduct. CA3 App. 153-54, 157-58.[4]

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court had jurisdiction over the motion to vacate under 28 U.S.C. § 2255. The

_____(cont'd)

8300 reporting the cash as originating with "The Cali Cartel." *See* CA3 App. 67.13-67.14 (defense opening statement). This attorney's conflicts of interest were not raised by the government or by the district court when he appeared for petitioner at sentencing. The same attorney proceeded to represent petitioner on his direct appeal as well. *See* 193 F.3d at 754. (He also represented petitioner on an unrelated indictment in the Eastern District of Pennsylvania.) Those Sixth Amendment violations were not raised in the § 2255 motion, however.

[4] The attorney conceded that he had not considered trying the venue question to the jury. CA3 App. 158-59. He commented that he had refrained from raising a defense of conventional entrapment in hopes of keeping predisposition evidence out of the record, and had not reconsidered that question when substantial and prejudicial evidence of the same sort was admitted into the trial record anyway. CA3 App. 154-56.

court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. Granting a motion by the petitioner for reconsideration of its original order, Appx. B1, the district court issued a Certificate of Appealability on August 7, 2001.

REASON FOR GRANTING THE WRIT

The decision below is predicated on a view of the relationship between a collateral attack and the decision in a prior appeal that is totally at odds with this Court's teachings.

This Court should grant certiorari and reverse the decision of the court below, because it is completely incompatible with the most basic principles of post-conviction review of federal criminal convictions which have previously been affirmed on direct appeal. The declaration by a court of appeals panel on direct appeal, necessarily on the basis of the record then before it, that certain defenses were not available to the defendant, simply cannot be binding in the disposition of a subsequent § 2255 motion which alleges that counsel rendered ineffective assistance in not researching and developing those alternate defenses.

The basis for the ruling of the court below, affirming the denial of § 2255 relief, was this:

> Furthermore, Strube cannot establish prejudice when this Court has already determined that his alternate defenses -- entrapment by estoppel and outrageous

> conduct by the Government -- would not have been available to him. See Pitt, 193 F.3d at 758-62.

Appx. A-4. In this respect, the court below echoed the decision of the district court, rejecting petitioner's suggestions that alternative lines of defense were sounder than the bogus "apparent authority" defense which had actually been advanced. The district judge ruled, in denying § 2255 relief, that outrageous governmental conduct and entrapment by estoppel were unavailable defenses in this case on the basis that the decision on direct appeal had conclusively so held. Appx. B4. Such reasoning is unsupportable.

> In its opinion on direct appeal, this Court wrote:
>
> [T]he entrapment by estoppel instruction was the proper instruction as to Pitt. However, Strube, who had no contact with [Customs Agents] Bowers or Mohle prior to his involvement with the shipments of the cocaine from Los Angeles to New York was not entitled to a similar instruction. The assurances of Pitt, his partner in crime, do not rise to the level of instructions, encouragement, or advice from a government official.

Appx. D13; *Pitt*, 193 F.3d at 758. The court below ruled that this passage precluded Mr. Strube's § 2255 motion claiming ineffective assistance of counsel for failing to advance the entrapment by estoppel defense at trial. It is true, as the court of appeals had stated, that petitioner was "not entitled to a similar instruction" at trial, but not for the reason in the prior appellate

decision. His lack of entitlement arose because his counsel never asked for such an instruction, as required by Fed.R.Crim.P. 30. *See* CA3 App. 67.1-67.3.

Surely the court of appeals had no occasion in its opinion to comment on whether petitioner *would have* been entitled to an entrapment by estoppel instruction, had it been sought, because petitioner never raised that question as an issue in his direct appeal.[5] What the district court relied upon, then, when it ruled in the course of denying the § 2255 motion that petitioner "was not entitled" to an instruction on entrapment by estoppel, was pure dictum. And more important, as this Court has long held, the decision of the court of appeals does not establish the "law of the case" with respect to a later post-conviction attack, when new law or other new information is brought to the court's attention. *Davis v. United States*, 417 U.S. 333, 342 (1974), quoting *Kaufman v. United States*, 394 U.S. 217, 230 (1969).[6] Similarly, as Justice Stewart wrote, in a concurring

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[5] The only related point raised on appeal was his Point I: "Whether the district court violated Mr. Strube's right to due process of law by refusing the present a jury instruction on public authority, his theory of defense, and failing to dismiss the prosecution based on outrageous governmental misconduct?" Brief for Appellant, No. 98-7497, at 1 ("Statement of Issues") (filed Jan. 19, 1999).

[6] In any event, the "law of the case" doctrine is only a rule of practice, which gives way when clear error in the earlier ruling is discovered. See *Castro v. United States*, 540 U.S. --, 124 S.Ct. 786, 793 (2003). Moreover, its application may also give way to the special nature of a case. See *Arizona v. California*, 460 U.S. 605, 618-19 (1983).

opinion joined by five Justices, "in habeas corpus, there is ... no res judicata ...." *Heflin v. United States*, 358 U.S. 415, 420 (1959).

Petitioner never had a valid "public authority" defense of any sort -- whether real or apparent. The reason is simple; Richard Pitt was not an official of the United States government. It was thus immaterial whether Pitt possessed, or appeared to Mr. Strube or anyone else to possess, legal authority to authorize what would otherwise be illegal conduct. Yet petitioner's defense attorney opened to the jury based on the "apparent public authority" label and then failed to deliver under that label, either in closing or in terms of support from the court's jury instructions. That the trial judge gave him instead a "mistake of fact" instruction did not cure the harm. At the very least, counsel's credibility (and thus petitioner's chances at trial) suffered a tremendous blow as a result of the forced change of focus from "public authority" to "mistake of fact."[7] What counsel urged was a defense based on the notion that petitioner (reasonably or not) believed that Pitt was legally authorized by the Customs Service to sell drugs and launder the proceeds. Counsel did not advance any theory that by virtue of his client's mistake of fact in this

[7] If the defense advanced by counsel had the same elements as that endorsed by the court but counsel at first used a different name for it, perhaps that would be unimportant (depending on the question of jury confusion). But that is not what happened. Defense counsel attempted to establish a legally baseless and factually unsupportable defense that was different in substance, not just in name, from that which the trial court later allowed the jury to consider.

regard petitioner lacked knowledge of a fact that the law requires him to have known in order to be deemed guilty; the instruction at trial was thus useless to him.

Even if the appellate court's remark about petitioner's entitlement *vel non* to a jury instruction he never requested were in some way binding on the district court during § 2255 proceedings, it still would have been error to treat the point as settled by the direct appeal. The appeal, like any other, was decided on the basis of a record. It may be that the record of trial was insufficient to establish the predicates for a defense based on entrapment by estoppel; this would not be surprising, considering that this defense was never raised prior to or during trial. Whether petitioner had any "contact with Bowers or Mohle prior to his involvement with the shipments of the cocaine," Appx. D13; 193 F.3d at 758, is a question of fact that was never decided by the jury nor necessary for petitioner to develop (on counsel's mistaken view of a "public authority" defense), assuming it to be determinative with respect to entrapment by estoppel.

As this Court has had recent occasion to note, the record developed at trial is almost never suitable for the decision of an ineffective assistance claim, including that claim's prejudice prong. See *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690 (2003). By treating the direct appeal opinion as determinative of matters raised for factual development in petitioner's § 2255 motion, the decision of the court below stands in sharp conflict with this Court's cases.

Had the issue of entrapment by estoppel actually been raised at trial or on appeal, the question under

governing Third Circuit law would have been whether petitioner could show that "(1) a government official (2) told the defendant that certain criminal conduct was legal." *United States v. West Indies Transport, Inc.*, 127 F.3d 299, 313 (3d Cir. 1997). Petitioner would have argued that Pitt was deputized by the actual government officials (the Customs agents) to recruit Mr. Strube to be a critical part of the Ridgely Warfield sting operation. The agents chose to have little or no direct contact with any civilians other than Pitt. It was then Pitt, the evidence shows, who assured petitioner that the entire enterprise was tacitly authorized by the Customs Service.

In giving that assurance, Pitt need not have been accurately reflecting what the agents actually told him, as long as the agents put Pitt in the position of recruiting others and gave him uncontrolled discretion as to what he could say to induce those others, like petitioner, to aid in the Customs Service's reckless adventures. On these facts, the due process principles which inform the doctrine of entrapment by estoppel are equally called into play. See *United States v. Penna. Indust. Chemical Co.*, 411 U.S. 655 (1973); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959). The court of appeals surely would not be able to say in the direct appeal that petitioner could not benefit from such a defense as a matter of law.[8] Had counsel actually

[8] Petitioner did not claim in the court below that entrapment by estoppel can arise from misleading advice given by a private individual. His point was that when a *government agent* conveys misleading legal assurances *indirectly*, that is, through an informant, the defense must be as fully available as when the defendant dealt with the agent directly. That issue

advanced the defense, and conducted the trial with an eye to developing the supporting facts, there is a reasonable probability that he could have produced a different outcome from the jury, or on appeal had the defense not been accepted by the trial court. Accordingly, the lower courts erred in finding that counsel's exclusive and ineffective reliance on the "public authority" defense was harmless.

Similarly, the district court held that petitioner could not demonstrate that prejudice flowed from his trial counsel's deficient performance by proving he had a valid, alternate defense of "outrageous governmental conduct." Counsel attempted to raise this defense by post-trial motion for new trial, although it should have been raised by pretrial motion to dismiss. At an evidentiary hearing petitioner would have shown, as was basically revealed in the agents' testimony at trial, that the Ridgely Warfield operation was structured and undertaken in such a manner that Pitt was the beneficiary of delegated authority to hire crew, assign them duties, and pay them in cash with drug proceeds.

Most important for present purposes, Pitt was also permitted to decide how much to tell each potential crew member (including the captain he recruited, that is, petitioner Strube) about the true purpose of the transaction; other than himself, none of the other operatives had a direct relationship with the Customs agents. The Customs Service thus put the irresponsible bounty-hunter Pitt, former (they hoped) drug smuggler and ex-

_____(cont'd)
was not decided against petitioner on direct appeal; it was neither raised nor even discussed.

prisoner, who was motivated not by the public interest or by duty but by the dream of a huge reward, in charge of determining, without anything approaching real supervision, who would or would not even potentially have a defense if things went wrong. For example, what if some FBI or DEA agent got wind of the Ridgely Warfield venture without knowing of its Customs provenance, and busted them all for conspiracy to smuggle? Would Pitt go free and his deck hands go to prison for life? The defense would then have argued that this arrangement should shock the conscience of the court. A pretrial motion to dismiss on these grounds, developed with an evidentiary hearing, would have had a "reasonable probability" of success sufficient for present purposes to establish the prejudice element of petitioner's ineffective assistance claim.

The decision of the court below that petitioner was barred from showing ineffective assistance of counsel through a § 2255 motion, by virtue of the ruling in his case on direct appeal, cannot be squared with basic principles of appellate and post-conviction law. The lower courts' analysis misconceives the scope of direct appellate review, as compared with a post-conviction petition, warranting this Court's intervention and consideration. The petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner WILLIAM MICHAEL STRUBE prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming the denial of his motion under 28 U.S.C. § 2255 to vacate sentence.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
Attorney for Petitioner

February 14, 2004.

APPENDIX A

Cite as: 65 Fed.Appx. 865, 2003 WL 21246540

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3526

UNITED STATES of America

v.

William Michael STRUBE, Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 97 Cr. 108-2)
District Judge: The Honorable Sylvia H. Rambo

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 6, 2003
Before ROTH, BARRY and FUENTES, Circuit Judges
(Opinion Filed: May 30, 2003)

OPINION OF THE COURT

FUENTES, Circuit Judge.

**1 The matter before the Court is an appeal of the District Court's denial of a motion to vacate sentence pursuant to 28 U.S.C. § 2255. After a trial by jury, the appellant, William Michael Strube ("Strube") was convicted of three counts of conspiring to distribute

approximately 486 kilograms of cocaine, possession with intent to deliver approximately 150 kilograms, and conspiracy to commit money laundering. The District Court sentenced Strube to 30 years of imprisonment, to be followed by 5 years of supervised release.

At his trial, the crux of Strube's defense was that a co-conspirator, Richard Lyman Pitt ("Pitt"), had represented to him that Pitt had the express authorization of the United States Customs Service to undertake a reverse sting operation on the Cali Cartel in Colombia. Pitt was a documented confidential informant for the Customs Service. In connection with that purported operation, Pitt enlisted Strube as ship captain to transport large quantities of cocaine. The Government, however, introduced evidence that defendants also transported large quantities of cocaine from Los Angeles to New York, without any approval from Government agents.

Based on these facts, Strube's attorney, in consultation with Pitt's attorney and Strube himself, decided to pursue the defenses of "apparent public authority" and mistake of fact. In essence, Strube attempted to argue that he reasonably believed "that his action was condoned by the [Governmental] agency which he believed had authorized him to engage in the criminal conduct." United States v. Pitt, 193 F.3d 751, 756 (3d Cir. 1999). In addition, Strube contended that his beliefs about the official authorization of his conduct, even if mistaken, negated his intent to violate the drug trafficking laws.

After the close of evidence, the District Court refused to charge the jury on the *867 requested instruction relating to apparent public authority, although a

proper charge was given as to the mistake of fact defense. The Court found that the record failed to demonstrate any evidence that the Government officials with whom Pitt was in communication actually had the authority to approve of the defendants' participation in the charged conduct. After he was found guilty on the three counts noted above, Strube appealed the verdict to this Court. Thus, in Strube's direct appeal, we previously affirmed the judgment of the District Court, holding that the defense of public authority only applies "to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question." Pitt, 193 F.3d at 758.

In his § 2255 motion, Strube contended that he was afforded ineffective assistance of counsel based on his attorney's misguided reliance on the defense of apparent public authority. In addition, Strube argued that he was prejudiced because his attorney's choice to argue apparent public authority precluded him from pursuing other allegedly meritorious defenses, such as entrapment by estoppel and outrageous conduct by the government. We agree with the District Court's decision to deny Strube's motion.

**2 The record reflects that Strube's attorney advised him of available defenses, discussed them with Pitt's attorneys, researched the various defenses, consulted Strube about the different strategies, and ultimately decided to pursue the apparent public authority defense, which involves undeniably complex analyses of fact and law. In other words, counsel made a reasoned, strategic decision which cannot be construed as so deficient that it undermined the proper functioning

of the adversary process. See Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, Strube cannot establish prejudice when this Court has already determined that his alternate defenses -- entrapment by estoppel and outrageous conduct by the Government -- would not have been available to him. See Pitt, 193 F.3d at 758-62.

For the reasons set forth above, we will affirm the judgment of the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:CR-97408-02
v.	:	
WILLIAM MICHAEL STRUBE	:	

FILED
HARRISBURG, PA
JUL 24 2001
MARY E. D'ANDREA, CLERK
Per /jr
Deputy Clerk

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1) Defendant Strube's motion filed pursuant to 28 U.S.C. § 2255 is DENIED for failure to state a cause of action.

2) This court declines to issue a certificate of appealability.

3) The Clerk of Court shall close the file.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: July 24, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:CR-97408-02
v.	:	
WILLIAM MICHAEL STRUBE	:	

FILED
HARRISBURG, PA
JUL 24 2001
MARY E. D'ANDREA, CLERK
Per /jr
Deputy Clerk

MEMORANDUM

Background

Before the court is a motion filed by Defendant Strube pursuant to 28 U.S .C. § 2255. Subsequent to the filing of the motion, Defendant also filed a motion to supplement the record. Oral argument was held on the latter motion after which Defendant was permitted to supplement the record by taking the deposition of his trial counsel.

Defendant stands convicted of the primary charge of engaging in a 1994 conspiracy to possess with intent to distribute 486 kilograms of cocaine. Richard Pitt, a co-conspirator and codefendant, was at the time of the conspiracy a documented informant for the United States Customs Service. Pitt and Strube defended their conduct with respect to the 486 kilograms of cocaine as a necessary predicate to obtaining, in a reverse sting operation, a quantity of cocaine from the Cali Cartel in Columbia. The primary defense advanced by Pitt and Strube was that of public authority, recognized by

Federal Rule of Criminal Procedure 12.3. It is this defense which is the nucleus of the present motion.

[2]Discussion

Strube contends that trial counsel was incompetent or ineffective in that he failed to adequately research the facts of this case and the law on public authority defense to the prejudice of Strube. The prejudice resulted when trial counsel advanced a public authority defense in his opening statement which involved the admission of the elements of the offense only to have this court rule out that defense before the conclusion of the trial.

This error in relying upon an inapplicable defense is alleged to be highly prejudicial because it not only involved the admission of all elements of the offense but precluded counsel from considering other defenses such as entrapment by estoppel, conventional entrapment, venue defense, Twigg defense, even a negotiated plea or no defense but require the government to meet its burden of proof.

The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). Not only must counsel's performance be deficient, that deficient performance must so prejudice to the defendant so as to deprive him of a fair trial. *Id.* at 687. Defendant must show that counsel's representation fell below an objective standard of reasonableness, *id.* at 688, and every effort must be made to eliminate the distorting effects of hindsight. *Id.* With this standard in mind, Defendant's allegations will be examined.

[3]Other Defenses Trial Counsel Could Have Raised

Twigg Defense

This defense, which is essentially a defense of outrageous government conduct, was announced in the case of *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978). In *United States v. Strube*, 193 F 751 (3d Cir. 1999), the court, on Strube's direct appeal, held that such a defense, even if timely raised, would not be available to Strube. *Id.* at 762. Counsel cannot be deemed to be ineffective for not raising a defense to which Defendant would not be entitled.

Entrapment by Estoppel

The Third Circuit Court of Appeals likewise found that entrapment by estoppel was not available to Strube. *Strube*, 193 F.3d at 758. Counsel cannot be deemed to be ineffective for not raising a defense to which Defendant would not be entitled.

Conventional Entrapment

Trial counsel was concerned about this defense because of the government's availability of evidence that would go to Strube's predisposition to commit a drug offense. (Transcript of Deposition of Mark Lancaster ("Lancaster Dep.") at 24, 26, 27.) While this concern was somewhat eviscerated by the admission of a tape recording in which Strube converses about cocaine with one Morales, this court and trial counsel were fully aware that predisposition evidence on Strube was overwhelming, and involved violent and dangerous activities that were better left out of a jury's hearing. Counsel cannot be deemed ineffective for choosing a path that keeps prejudicial, but admissible, evidence away from a jury.

[4]Put the Government To Its Proof/
No Defense/Plea of Guilty

Had trial counsel chosen this course of action, this court would still be faced, in all probability, with an allegation of incompetent counsel for not raising a defense. The evidence against Strube was overwhelming. The evidence could not be countered except with the defense of public authority, which failed, or entrapment, which was extremely dangerous because of highly negative evidence that would come before the jury concerning Strube's predisposition to commit the crime in question.

Looking at the situation objectively, trial counsel could proceed as he did, or have Strube plead guilty. Trial counsel had plea negotiations with the government, but they were unsuccessful. (Lancaster Dep. at 30-31; Transcript of Oral Argument on 2255 Motion ("Tr. Oral Argument") at 30-31.)

Public Authority Defense

Strube argues that had trial counsel more thoroughly investigated the facts of this case and the law of public authority, he would not have raised this defense. Until the decision in this case, there were no other reported decisions in the Third Circuit on the issue of public authority. As current defense counsel noted:

> This is a very, very difficult case, ... in terms of selecting the correct strategy. The appellate cases in this area make it clear that the lines between public authority, actual authority, real authority, apparent authority, mistake of fact, mistake of law, entrapment

by estoppel, entrapment by conventional means, these are all hairline distinctions.

(Tr. Oral Argument at p. 22.) With this acknowledgment and without a definitive ruling by the Third Circuit, trial counsel may have been ineffective if he had not pursued this defense.

[5] Trial counsel, associate counsel Tunkey, and other associates researched the public authority defense, conferred with both Defendants Strube and Pitt as to the underlying facts of the case, talked with U.S. Customs agents, reviewed other discovery material, and felt they could successfully present this defense.

Until the Third Circuit Court of Appeals ruled that public authority meant actual authority from an appropriate government agent, trial counsel had no reason not to present the defense. Eliminating the distorting effects of hindsight, this court cannot find that trial counsel's strategy fell below an objective standard of reasonableness in using this defense.

Apprendi Claim

Strube argues that the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is violated in that the amount of drugs was not presented to the jury. The court first must decide whether *Apprendi* announces a new rule of law. In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court held that a rule is new if it "breaks new ground or imposes a new obligation on the State or Federal Government," or if the result of the rule "was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301. *Apprendi* was not dictated by precedent and clearly imposes a new obligation on the government. Thus, a new rule is announced by *Apprendi*.

A new rule is not applicable to cases which have become final before the announcement of the new rule unless it falls within one of two exceptions announced in *Teague*, *supra*. Defendant's case became final before *Apprendi* was [6] decided. The issue next to be decided is whether any of the exceptions in *Teague* apply to the case at bar.

Defendant was charged, among others, with conspiracy to knowingly and intentionally distribute cocaine and possession with intent to distribute approximately 486 kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The punishment range for this offense would be a minimum of ten years to life. The amount of the drugs was not submitted to the jury, rather this court determined the amount prior to the imposition of sentence.

For *Apprendi* to be applicable to this case it must fall within one of two exceptions. First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692-93 (1971)).

The first exception relates to a situation rendering certain acts non-criminal and is not relevant here. Apprendi cannot affect the instant case unless its holding is a "watershed rule of criminal procedure" that is implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311 (internal quotes omitted). For the rule to

qualify under the second exception, it "must implicate the fundamental fairness of the trial" and be such that without it "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 312, 313.

Did this court's determination of drug quantity render Defendant Pitt's trial unfair or an unreliable vehicle for determining guilt or innocence? The jury [7] found beyond a reasonable doubt that Defendant was guilty of conspiracy to distribute cocaine. The evidence against Defendant was overwhelming. There is no basis to believe that the likelihood of an accurate conviction is seriously diminished by not applying *Apprendi* retroactively.

Finally on this issue, this court notes that *Apprendi* does not state that it applies retroactively. Many cases have held that *Apprendi* does not apply retroactively to cases on initial review. *See Jones v. Smith*, 231 F.3d 1227, 1237-38 (9th Cir. 2000); *Ware v. United States*, 124 F.Supp.2d 590 (M.D. Tenn. 2000); *United States v. Johnson*, 126 F. Supp.2d 1222 (D.Neb. Dec. 7, 2000); *United States v. Joseph*, 2000 WL 1789989 (E.D.La. Dec. 5, 2000); *United States v. Pittman*, 120 F. Supp.2d 1263 (D.Or. 2000); *West v. United States*, 123 F. Supp.2d 845 (D.Md. 2000); *United States v. Murphy*, 109 F.Supp.2d 1059, 1064 (D.Minn. 2000).

Other courts have held that *Apprendi* does not apply retroactively to cases on collateral review for purposes of certifying a second or successive petition for habeas corpus relief. *See In re Tatum*, 233 F.3d 857 (5th Cir. 2000); *Smith*, 231 F.3d at 1237-38; *Rodgers v. United States*, 229 F.3d 704 (8th Cir. 2000); *Talbott v. State of Indiana*, 226 F.3d 866, 868-70 (7th Cir. 2000);

In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 (1st Cir. 2000).

For the foregoing reasons, this court does not find *Apprendi* applicable to the instant case.

[8] Use of Tape Recordings

Strube alleges counsel failed to make effective use of tape recorded messages between Defendants and U.S. Customs agents. Some tapes were considered irrelevant by this court and were precluded. Defense counsel, however, argued vigorously for any transcripts of some of the tape recordings possessed by the government. Counsel were permitted use of these transcripts and tapes showing acts by agents which tended to support the defense. Strube does not proffer any tape that would have affected the outcome of the trial.

Venue

Strube alleges counsel failed to raise a venue issue. Counsel's decision whether or not to object to venue is within the scope of considered trial strategy. In any event, venue was proper in the Middle District of Pennsylvania.

At some point in this conspiracy, codefendant Richard Pitt convinced his half brother Wallace Pitt to drive two bags containing cocaine to Strube's house in Lancaster County, Pennsylvania.[1] At a subsequent time, Wallace Pitt was asked to drive 150 kilograms of cocaine to New York. Wallace Pitt drove through Pennsylvania on Interstate 80 to New York. (Transcript of Jury Trial,

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[1] Lancaster County is in the Eastern District of Pennsylvania.

Vol. I, at p. 68, line 20.) Interstate 80 passes through the Middle District of Pennsylvania. Thus, at least part of the overt acts in furtherance of the conspiracy occurred in the Middle District of Pennsylvania.

Furthermore, Strube fails to allege any prejudice in counsel's decision to proceed in the Middle District of Pennsylvania.

[9] Based on the foregoing, the motion fails to demonstrate ineffective assistance of counsel and the motion will be denied. An appropriate order will be issued.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: July 24, 2001.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3526

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM MICHAEL STRUBE,

Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 97 Cr. 108-2)
District Judge: The Honorable Sylvia H. Rambo

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH and CHERTOFF, Circuit Judges

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The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

s/Julio M. Fuentes
United States Circuit Judge

DATED: SEP 17 2003

APPENDIX D

193 F.3d 751

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-7383, 98-7497

UNITED STATES of America,

v.

Richard Lynn PITT, Appellant in No. 98-7383

UNITED STATES OF AMERICA,

v.

William Michael STRUBE, also known as Mike Strube, Appellant in No. 98-7497

Argued May 26, 1999.
Decided Oct. 1, 1999.
As Amended Oct. 15, 1999.

754 BEFORE: GREENBERG and ALITO, Circuit Judges, and DOWD, District Judge

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* Honorable David D. Dowd, Jr., Senior Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

OPINION OF THE COURT

DOWD, District Judge.

I. INTRODUCTION

The appellants, Richard Pitt and William Strube, stand convicted of the primary charge of engaging in a 1994 conspiracy to possess with intent to distribute 486 kilograms of cocaine. Richard Pitt was, at the time of the conspiracy, a documented confidential informant for the United States Customs Service. Pitt and Strube defended their conduct with respect to the 486 kilograms of cocaine as a necessary predicate to obtaining, in a reverse sting operation, an enormous quantity of cocaine from the Cali Cartel in Colombia. In preparation, Pitt and Strube purchased the Ridgely Warfield, a sea-going vessel which was to be used to transport the Cali cocaine. Thus the primary defense advanced by Pitt and Strube was that of public authority, recognized by Fed.R.Crim.P. 12.3. The district court's denial of a jury instruction based on the defense of public authority is the primary error advanced in the appeals of Pitt and Strube. We affirm the convictions and sentences.

II. FACTUAL AND PROCEDURAL BACKGROUND

Richard Pitt, a pilot and a smuggler by trade, enlisted as a documented confidential informant with the U.S. Customs Service in 1992 after his release from a Mexican prison based on a sentence arising from flying a load of cocaine into Mexico from Colombia. In 1993, Pitt brokered a deal between an undercover Customs agent and a group of Mexicans to buy $1.3 million worth of cocaine. The reverse sting was successful and

$1.3 million was seized, with Pitt receiving $350,000 for his efforts.

While still working with U.S. Customs Special Agents Roger Bower and Chuck Mohle, Pitt conceived a plan to entice the Cali Cartel to hire him to transport a large quantity of cocaine by an ocean-going vessel. Pitt enlisted Strube in that plan and they acquired the Ridgely Warfield for that avowed purpose. Agents Bower and Mohle were advised on the Pitt-Strube plan. However, Pitt and Strube did not advise the Customs agents that, in the summer of 1994, they were receiving and transporting large shipments of cocaine from Los Angeles to New York. The first shipment of 150 kilograms took place in mid-July; the second shipment of 150 kilograms took place in early August of 1994. A California State police officer intercepted the third shipment of 186 kilograms destined for New York in a vehicle driven by Pitt. Information about the third shipment was obtained by an on-going Title III interception; however, the stop of vehicle was made for the ostensible reason of a *755 traffic violation so as avoid any revelation about the Title III operation. The traffic stop led to the seizure of the 186 kilograms in the third shipment.

During the government's case in chief, persuasive testimony was produced which demonstrated the culpability of Pitt and Strube relating to the first two shipments of cocaine to New York, including the testimony of Pitt's relatives who had been involved in the operation. The recipient of the cocaine in New York, Gloria Ramirez, also testified and accounted for the large sums of cash that were subsequently delivered to Pitt and Strube in payment for the earlier shipments.

The government produced Customs Agents Bower and Mohle who offered extensive testimony about their relationship with Pitt as the documented confidential informant for Customs. They conceded that Pitt had outlined his plan to persuade the Cali Cartel to use the seagoing vessel Ridgely Warfield, to transport cocaine to the United States for seizure. However, they denied any advance information about the Pitt-Strube plan to ship the 468 kilograms of cocaine to New York from Los Angeles. They also insisted that Pitt had been advised by his separate contacts that he was not authorized to engage in criminal conduct as a part of his plan. Pitt also testified at length about his contact with Bower and Mohle and suggested that they had agreed inferentially with criminal conduct to bring about the anticipated large shipment of cocaine by use of sea-going vessel.

In ruling on the Pitt motion for a new trial, the district court summarized his testimony as follows:

> ... Defendant himself admitted that no one had told him he could sell cocaine for profit. (Trial Transcript ("Tr.") at 1218.) He also acknowledged that he knew it was against U.S. Customs' policy to let drugs "walk" and, therefore, could not get official approval for his operation. (Tr. at 869.) In fact, he admitted hesitating in carrying out his plan once he was requested by the Cali Cartel to make three test runs because he knew it was wrong. (Tr. at 1201.) Further, he did not tell agents Bowers and Mohle the full extent of his plan until after he was arrested. (Tr. at 1181.) Additionally, there was testimony

> from the agents that they never authorized Defendant to distribute cocaine and that Defendant had been told in the past this could not be done ....

(Supplemental Appendix ("S.A.") at 21).

III. DISCUSSION

A. THE DEFENSE OF PUBLIC AUTHORITY

Defendants Pitt and Strube contend that prejudicial error resulted from the district court's refusal to give a jury instruction based on their defense of public authority. Defendants filed a Notice of Intent to Present the Defense of Public Authority pursuant to Fed.R.Crim.P. 12.3 and requested that the district court issue a jury instruction for that defense. The district court declined reasoning that, since Pitt did not have actual authority to empower Strube to move cocaine, Strube was not entitled to an instruction on that defense. Instead, the district court instructed the jury on entrapment by estoppel for Pitt and mistake of fact for Strube.[1]

The district court's refusal to give a requested jury instruction is reviewed for an abuse of discretion. *United States v. Gross*, 961 F.2d 1097, 1101 (3d Cir.), *cert. denied*, 506 U.S. 965, 113 S.Ct. 439, 121 L.Ed.2d 358 (1992). In determining whether the district court abused its discretion, this Court evaluates whether the proffered instruction was legally correct, whether or not it was substantially *756 covered by other instructions,

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[1] Mistake of fact is not a complete defense, but can negate the intent element necessary for a conviction.

and whether its omission prejudiced the defendant. *Id.* However, inasmuch as we review a "court's refusal to instruct the jury on a defense theory de novo," *United States v. Stewart*, 185 F.3d 112, 124 (3d Cir. 1999), it would have been an abuse of discretion if the defendants were entitled to a public authority charge and the court refused to give it.

The defense of "public authority" is based in common law. Under the defense, illegal actions committed by a public official or an officer of the law in the course of his duties were not crimes.[2] Originally, this defense only applied to cases where the agency possessed the authority to permit the actor to engage in the otherwise illegal conduct and the actor was given permission. Published decisions pertaining to the defense of actual public authority are sparse, possibly because reliance on the defense is rare.

Recognition of the defense of "apparent" public authority appears in *United States v. Barker*, 546 F.2d 940 (D.C.Cir. 1976), a case related to the infamous Watergate debacle. A divided court of the D.C. Circuit decided that the defense should be extended to an individual who acted at the behest of a government official and in reasonable reliance on that official's authority to permit the behavior. *Id.* at 948-49. Judge Wilkey, writing for the majority, cited two requirements a defendant must show to excuse his conduct: 1) there were facts justifying defendant's reasonable reliance on

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[2] Often the cases involved police officers and their conduct in the course of their duties.

the official; and 2) there is a legal theory on which to base a reasonable belief that the official possessed the authority to permit the conduct. *Id.* at 949. This has become known as the defense of "apparent public authority." This defense differs from actual public authority because the defendant is not required to establish that the government official had the authority to sanction the illegal activity. Instead, the defendant asserts the belief that his action was condoned by the agency which he believed had authorized him to engage in the criminal conduct.

After *Barker*, the number of cases where the defendant claimed that he was acting under actual or apparent public authority began to increase.[3] As a consequence, Congress became concerned with the increasing number of defendants attempting to utilize this common law

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[3] Many times, defendants claimed they were acting on the authority of the Central Intelligence Agency ("CIA"). *See, United States v. Anderson*, 872 F.2d 1508 (11th Cir.), *cert. denied*, 493 U.S. 1004, 110 S.Ct. 566, 107 L.Ed.2d 560 (1989); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir.), *modified on other grounds*, 801 F.2d 378 (11th Cir. 1986), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985); *United States v. Wilson*, 732 F.2d 404 (5th Cir. 1984), *cert. denied*, 469 U.S. 1099, 105 S.Ct. 609, 83 L.Ed.2d 718 (1984); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984), *cert. denied*, 479 U.S. 839, 107 S.Ct. 143, 93 L.Ed.2d 85 (1986); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983); *United States v. Sampol*, 636 F.2d 621 (D.C.Cir. 1980). As a result, the defense of actual or apparent public authority was often termed the "CIA Defense."

defense, the problems of surprise the defense created at trial and the subsequent disclosures of confidential information which the defense often required.[4] Therefore, Congress proposed an addition to the Federal Rules of Criminal Procedure requiring a defendant to make a pre-trial disclosure of his intention to use the defense. The proposed rule was added to the "Omnibus Intelligence and Security Improvements Act" (H.R.1082, 1985) and was entitled "Title II -- Intelligence or Law Enforcement Defense Pretrial Notification Act."

*757 When the Omnibus Intelligence and Security Improvements Act was not enacted into law, the Justice Department submitted the proposed rule to the Criminal Rules Advisory Committee. The Committee prepared and circulated a proposed rule in September of 1986 requesting comment, proposed alterations, and possible concerns. Before the proposed rule emerged from the rule-making process, it was adopted as part of the Anti-Drug Abuse Act of 1988 (Pub.L. No. 100-690, § 6483, 104 Stat. 4181).

Since Congress short-circuited the rule-making process in adding a Rule 12.3 to the Federal Rules of Criminal Procedure, no Advisory Committee Note

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[4] In fact, many of the pre-Rule 12.3 public authority cases involve defendants/appellants claiming error in both the denial of public authority jury instructions and in excluding evidence supporting their public authority defense under the Classified Information and Procedures Act ("CIPA"). CIPA was enacted to reduce the amount of classified information divulged by requiring pre-trial hearings to determine the relevance of the evidence.

("Note") accompanies the rule; however, a proposed Note was submitted in connection with the Criminal Rules Advisory Committee September 1986 proposal.[5] Courts have subsequently looked to that proposed but unadopted Note for guidance as to the scope and application of Rule 12.3.

That Note cites two cases as examples of what the Rule was intended to cover, *United States v. Sampol*, 636 F.2d 621 (D.C.Cir. 1980) and *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983). In *Sampol*, defendants convicted of murder for their role in an assassination appealed the court's refusal to allow their affirmative defense that the CIA authorized the killing. In *Wilson*, a former intelligence agent was convicted of selling weapons to Libya. On appeal, Wilson claimed he had acted on the good faith belief that his actions were sanctioned by the CIA. The court refused to overturn Wilson's conviction because there was no evidence to support the conclusion that his reliance on public authority was objectively reasonable.[6]

Once Rule 12.3 was enacted, the public authority defense required two components: 1) a procedural

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[5] The Proposal is reprinted at 111 F.R.D. 489, 499.

[6] Wilson was unsuccessful in raising this defense in two subsequent trials as well. *United States v. Wilson*, 732 F.2d 404 (5th Cir. 1984) (determining that refusal to permit "CIA Defense" and good faith defense for his selling of plastic explosives to Libya was not error); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984) (holding that refusal to allow "CIA Defense" for charges of attempted murder and witness tampering was not error).

component, namely, compliance with the Rule; and 2) a substantive common law component. Rule 12.3 itself is entirely procedural in nature. It is similar to Rules 12.1 and 12.2 which require defendants to give notice for defenses of alibi and insanity. Rule 12.3(a)(1) requires that the defendant file, at the time of pre-trial motions, a notice of intent to use the defense of actual or believed public authority. Rule 12.3(a)(2) also includes disclosure requirements pertaining to witnesses and other evidence. Rule 12.3 does not, however, include a discussion of substantive requirements for the defense. Therefore, the Rule does not alter the common law requirements.

The language of Rule 12.3 enumerates two defenses: 1) actual public authority; and 2) believed or apparent public authority. As already discussed, actual public authority involves a defendant who was authorized to commit the otherwise illegal act, whereas apparent public authority occurs when the defendant was not actually permitted to engage in the criminal activity but believed he was. Just as for actual public authority, the enactment of Rule 12.3 did not alter the defense of apparent public authority. Therefore, the law in jurisdictions where actual authority was required was not altered.[7]

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[7] *United States v. Cardoen*, 898 F.Supp. 1563 (S.D.Fla. 1995), *aff'd sub nom United States v. Johnson*, 139 F.3d 1359 (11th Cir.), *reh'g denied*, 149 F.3d 1197 (11th Cir. 1998) (determining that authority relied upon must be real and not apparent), *cert. denied*, 527 U.S. 1021, 119 S.Ct. 2365, 144 L.Ed.2d 770 (1999); *United States v. Rosenthal*, 793 F.2d 1214, 1235-37 (11th Cir. 1986) (stating that defendant could

*758 This Court approves and will follow the holding in *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994), which limits the use of the defense of public authority to those situations where the government agent in fact had the authority to empower the defendant to perform the acts in question. As a corollary, *Baptista-Rodriguez* holds that where the government agent had no such power, the defendant may not rest on the "public authority" defense.

In this case, the unrebutted testimony was that neither Bowers nor Mohle had the authority to empower Pitt to engage in acts alleged and proven with respect to the charged conspiracy. To the contrary, the testimony was to the effect that only the Director of Customs and the Director of the Drug Enforcement Agency, in conjunction with the approval of the United States Attorney for the subject district, could sanction and authorize the type of conduct in which Pitt and Strube engaged with respect to the charged 468 kilograms of cocaine.

The district court did charge the jury, as to Pitt only, with respect to the defense of entrapment by estoppel. This defense arises when a government official tells a defendant that certain conduct is legal and the defendant commits what otherwise would be a crime in reasonable reliance on the official representation. *See Baptista-Rodriguez*, 17 F.3d at 1368 n. 18 for a

_____(footnote continued)

only be exonerated if he relied on real and not apparent authority); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984) (declining to adopt apparent authority from *Barker* and instead requiring actual authority).

comparative analysis of the defenses of innocent intent, public authority, apparent public authority and entrapment by estoppel.

In this case, while there was no testimony by Pitt that he was told by either Bowers or Mohle that he could engage in the indicted activity, Pitt did offer testimony to the effect that he believed he had the implicit authority to engage in whatever criminal activity was necessary in order to entice the Carli Cartel to eventually use his ship to transport the large quantity of cocaine to the United States for seizure and thereby bring about the arrest of persons who would arrive to take control of the shipment or parts of the shipment.[8]

We find no error in the decision of the district court in refusing to give the public authority defense instruction and we find that the entrapment by estoppel instruction was the proper instruction as to Pitt. However, Strube, who had no contact with Bowers or Mohle prior to his involvement with the shipments of the cocaine from Los Angeles to New York was not

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[8] The requirement of pre-trial notice as to a defense based on government authority, alibi, and insanity entitles the government to be prepared for such a defense. Curiously, we find no requirement that a defense based on entrapment by estoppel be the subject of similar pretrial notice and accompanying requirements. However, from a conceptual standpoint, we see little, if any, difference between the defense of apparent public authority and entrapment by estoppel. Since the issue of notice prior to use of the entrapment by estoppel defense has not been briefed, we see no need to rule definitively on that issue at this time.

entitled to a similar instruction. The assurances of Pitt, his partner in crime, do not rise to the level of instructions, encouragement, or advice from a government official.

B. DENIAL OF PITT'S MOTION FOR ACQUITTAL BASED ON THE DEFENSE OF ENTRAPMENT BY ESTOPPEL

Pitt argues that it was error for the district court to deny his motion for acquittal because the prosecution failed to rebut his defense of entrapment by estoppel. Against that argument the Court is required to view the evidence and inferences logically deduced therefrom in the light most favorable to the jury verdict. *United States v. Pungitore*, 910 F.2d 1084, 1128-29 (3d Cir. 1990), *cert. denied*, 500 U.S. 915, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991).

United States v. Brebner, 951 F.2d 1017, 1025 (9th Cir. 1991) teaches that *759 the entrapment by estoppel defense rests not on the defendant's state of mind, but on a due process theory that shifts the focus from the conduct of the defendant to the conduct of the government. Pitt argues that the facts, as developed in a light most favorable to the government, were not sufficient to contradict his defense of entrapment by estoppel. He points to the fact that he was under contract with Customs to work as a confidential informant; that the Customs agents were aware that Pitt would work on cases without a specific contract; and that they knew of his plan to import approximately 16,000 kilos of cocaine into the United States from Colombia.

Based on that combination of facts, Pitt argues that it could be inferred that he was authorized to engage in

the preliminary transactions, i.e., the shipment of the 468 kilograms of cocaine from Los Angeles to New York City, to gain the confidence of the Colombian cartel. Such an argument justified the district court's submission of the defense of entrapment by estoppel, but is insufficient to support an acquittal as a matter of law.

The defense of entrapment by estoppel turns on credibility. The jurors apparently believed Customs Agents Bowers and Mohle when they testified that they did not know of Pitt's plan to distribute the three shipments of cocaine from Los Angeles to New York, nor had they authorized such conduct. Moreover, as indicated in the district court's summary cited earlier, Pitt clearly testified that no one authorized him directly or indirectly to commit the crimes for which he stands convicted.

The district court properly denied Pitt's post-verdict motion for an acquittal.

C. FAILURE TO DISMISS THE INDICTMENT AGAINST STRUBE FOR ALLEGED OUTRAGEOUS CONDUCT BY THE GOVERNMENT

Defendant Strube argues on appeal that, due to outrageous conduct by the government, it was error for the district court to refuse to dismiss the indictment against him. Strube, unlike Pitt, did not testify. On appeal, through counsel, he appears to concede that he engaged in the charged conspiracy, but argues that from its inception through its planning, staffing, funding, implementation and direction, it was a creature of Richard Pitt, who was himself a creature of the United States Customs Service. While acknowledging the fact of a dispute between Pitt and the Customs agents as to

whether they had authorized Pitt to move loads of drugs across the country in aid of the plan to use the Ridgely Warfield ship to transport the cocaine from Colombia to the United States, Strube argues that it is not in dispute that Pitt told his recruits to move loads of cocaine across the country, that Pitt told them that Customs had specifically authorized them to do this, and that the recruits, including Strube, had every reason to believe what Pitt told them and to do as instructed.

Strube advances the proposition that the government action by Bowers and Mohle in overseeing the Pitt operation with the goal of eventual use of the Ridgely Warfield to make a huge drug bust aimed at discouraging the continued importation of cocaine by a Colombian cartel, should require under due process principles a dismissal of his prosecution. To achieve that desired result, Strube alleges that the conduct of Bowers and Mohle in their oversight of Pitt constituted "outrageous government conduct."

The government argues that Strube failed to raise this defense at trial and, therefore, it should be considered waived and Strube should be precluded from raising the issue on appeal.

The defense of outrageous government conduct examines whether a defendant's due process rights have been violated because the government created the *760 crime for the sole purpose of obtaining a conviction. It emerged from dicta in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), where the Court determined that the entrapment defense was not available to the defendant because he was predisposed to committing the crime, but went on to state that some

day there may be a due process defense based upon outrageous government conduct. *Id.* at 431, 93 S.Ct. 1637. Then, in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), the Court upheld Hampton's conviction, thereby limiting the defense.[9] Although the conviction was upheld by a majority of five, the concurrence of Justices Powell and Blackmun demonstrated their hesitancy to foreclose the existence of a due process challenge.

United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980) teaches that the defense of outrageous government conduct is based on an alleged defect in the institution of the prosecution itself and, as a consequence, is covered by the provisions of Fed.R. Crim.P. 12(b) which requires that a defendant raise in a pretrial motion: (1) defenses and objections based on defects in the institution of the prosecution; or (2) defenses and objections based on defects in the indictment or information. Since Nunez-Rios did not raise the issue of outrageous government conduct prior to trial, the court held he had waived the right to assert the defense on appeal. *Id.* at 1099. It is well established that the issue of outrageous government conduct is for the court, and not the jury, to resolve. *Id.* at 1098. *See also United States v. Nolan-Cooper*, 155 F.3d 221, 234 (3d Cir. 1998). As a consequence, the necessity for the

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[9] In *Hampton*, a government informant supplied the defendant with the heroin he sold to an undercover government agent. The defendant stated that the government's conduct of being both the supplier and buyer violated his due process rights.

pretrial motion to dismiss is obvious unless the evidence supporting the claim of outrageous government conduct is not known to the defendant prior to trial.

This Circuit addressed failure to plead the defense in *United States v. Gonzales*, 927 F.2d 139 (3d Cir. 1991). In that case, a drug transaction was initiated by an informant. A government agent was the seller and the defendant was a buyer. After his conviction, defendant argued that the contingency fee arrangement between the informant and the government constituted outrageous governmental conduct. The Court examined the procedural requirement outlined in *Nunez-Rios, supra*, but declined to apply a procedural bar under the facts of that case because defense counsel did not receive relevant information until the eve of trial, making compliance with the procedural requirement virtually impossible. The Court then evaluated the case based upon a plain error standard and determined that the conduct was not outrageous.[10]

Strube did not raise the defense of outrageous government conduct in a pretrial motion, and he has provided no good explanation for failing to do so. Unlike the defendant in *Gonzales*, Strube did not discover facts about government involvement shortly before his trial. Further, Strube's main defense at trial was that he was authorized by a government agent to

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[10] The informant in *Gonzales* had a contingency fee arrangement with the government that was not fully disclosed until the Friday before a Monday trial. The informant and the government had set up a "reverse sting" and the defendant was convicted of drug charges.

commit his illegal actions. Therefore, Strube was always aware of the facts upon which he now claims this defense. Since Strube offers no reason for his failure to raise the defense at trial, the Court need not make an exception to his waiver. *See, United States v. Coppola*, 526 F.2d 764, 773 (10th Cir. 1975) (refusing to grant an exception to waiver on appeal because the defendant had two years to raise the defense, he failed to demonstrate good cause *761 for non-compliance with Rule 12(b), and he failed to show any prejudice from the waiver).

Even if Strube had properly raised this defense, it would fail. Strube claims his case parallels *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), because the government "created, staffed, directed and implemented a criminal enterprise which would not have otherwise existed." (Strube's Op. Br. at 36). In *Twigg*, the Court addressed charges of drug *production* where the government provided chemical components, glassware, expertise and a location. Without that assistance, the defendants would not have had the ability to produce the drug.[11] Strube argues that, as in *Twigg*, the government

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[11] Strube fails to recognize that, since *Twigg*, this Court has used extreme caution in finding due process violations in undercover settings. *United States v. Voigt*, 89 F.3d 1050, 1065 (3d Cir.), *cert. denied*, 519 U.S. 1047, 117 S.Ct. 623, 136 L.Ed.2d 546 (1996). *See also, United States v. Nolan-Cooper*, 155 F.3d 221, 229-30 (3d Cir. 1998) (continuing to recognize the existence of the defense but observing the hesitancy of the judiciary to uphold due process violation claims); *United States v. Gambino*, 788 F.2d 938,

created the crime through its agents, Pitt, Bowers and Mohle.

Assuming, arguendo, that Pitt was an agent of Customs acting with its authority, Strube's defense would still fail. There are significant factual differences between the cases Strube cites and his case. In previous cases, courts have determined that, in order for the claim of outrageous government conduct to succeed, a government agent has to initiate the criminal conduct with the goal of obtaining a conviction and must draw the defendant into the illegal activity to bring about that goal. *See, United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (reversing conviction because agent contacted defendant, who had no criminal record, and supplied him with drugs defendant sold to another agent)[12]; *Twigg, supra* (reversing conviction because informant contacted defendants and initiated drug production to get them convicted); *Nolan-Cooper, supra* (emphasizing defendant's ongoing involvement in criminal activity before agent approached her); *United States v. Gardner*, 658

_____(footnote continued)

945 n. 6 (3d Cir.), *cert. denied*, 479 U.S. 825, 107 S.Ct. 98, 93 L.Ed.2d 49 (1986) (same). *See also, United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982); *United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983); *United States v. DeRewal*, 10 F.3d 100 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S.Ct. 1544, 128 L.Ed.2d 196 (1994) (all calling *Twigg* into doubt).

[12] *Called into doubt by United States v. Beverly*, 723 F.2d 11,12 (3d Cir. 1983).

F.Supp. 1573 (W.D.Pa. 1987) (reversing conviction because informant pursued defendant even after defendant refused to find cocaine for him and tried to give informant's money back).[13] In this case, various Colombian drug cartels were the target for criminal prosecution. So while this operation was intended to secure a conviction, it was not the conviction of Strube. The defense of outrageous government conduct is not applicable.

Even if the operation had been orchestrated to convict Strube, the conduct would still not rise to the level of violating Strube's right to due process. To meet that standard, the challenged conduct must be shocking, outrageous, and clearly intolerable. *United States v. Mosley*, 965 F.2d 906, at 910 (10th Cir. 1992). It must violate *762 our sense of fundamental fairness or shock

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[13] *See also, Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (reversing bootleggers' convictions because they had ceased criminal activity until an agent contacted them and provided supplies for production); *United States v. Batres-Santolino*, 521 F.Supp. 744 (N.D.Cal. 1981) (reversing conviction because informant induced defendants into cocaine deal so his DEA friends could arrest them; defendants lacked prior criminal involvement and wanted to back out); *United States v. Mosley*, 965 F.2d 906 (10th Cir. 1992) (upholding conviction even though seller was a government agent); *United States v. Pedraza*, 27 F.3d 1515 (10th Cir.) (upholding the conviction because defendants originally contacted the undercover agent rather than being induced into criminal activity), *cert. denied*, 513 U.S. 941, 115 S.Ct. 347, 130 L.Ed.2d 303 (1994).

the universal sense of justice. *Russell*, 411 U.S. at 432, 93 S.Ct. 1637. There is nothing so shocking here.

In sum, Strube waived the issue of outrageous government conduct by failing to move to dismiss prior to trial. In any event, the claim of outrageous government conduct is totally lacking in merit.

D. THE POST-CONVICTION CHALLENGE TO THE LACK OF VENUE

Both Pitt and Strube argue that the government failed to meet its burden of proving the venue of the alleged offenses. Neither defendant challenged the absence of venue until after their convictions. The government asserts that the proof established venue. We need not address the issue of venue in this case given the time of the initial objection. *United States v. Robinson*, 167 F.3d 824, 829 (3d Cir. 1999)[14] is dispositive in its holding that the issue of improper venue, at the very latest, must be raised in every possible scenario before the jury reaches its verdict.

E. ADMISSION OF TAPE RECORDINGS BY STRUBE ALLEGEDLY RELATED TO SUBSEQUENT UNCHARGED NARCOTICS TRANSACTIONS

Over objection, the district court permitted the government to introduce the May 22, 1995 recorded conversation between Strube and George Morales, a government informant. The conversation was nine months after the intercepted third shipment of

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[14] A petition for certiorari was filed on June 4, 1999 (No. 98-9669).

cocaine.[15] It is apparent from a reading of the conversation that the jury could find that Strube is discussing cocaine and, by inference, his involvement in the first shipment of 150 kilograms of cocaine. The district court found the statement admissible against the background of the defense anchored in public authority. To the extent the statements of Strube alluded to subsequent cocaine transactions, they were admissible under the teachings of Fed.R.Evid. 404(b) on the issue of intention. We find no error.

F. SUFFICIENCY OF EVIDENCE OF CONSPIRACY TO LAUNDER DRUG TRAFFICKING PROCEEDS

United States v. Reed, 77 F.3d 139, 142 (6th Cir.), *cert. denied*, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996), teaches that mere transportation of drug proceeds is insufficient proof of a violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (a)(2) for laundering drug trafficking proceeds. However, the evidence viewed in a light most favorable to the government demonstrates that in excess of $1 million in drug trafficking proceeds was collected in New York and transported, either to Colombia, South America or to Pennsylvania. The proceeds were used by both Pitt and Strube to pay individuals like Wallace Pitt and others for their assistance in flying and driving the cocaine across the country. The monies were also used to pay the credit card bills of Pitt which included travel charges related to his drug trafficking activities. We find the claim of insufficient

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[15] A transcript of the audio tape is found in the Supplemental Appendix. (S.A. at 12-18).

evidence as to the laundering of the drug trafficking proceeds to be without merit.

G. DENIAL OF STRUBE'S MOTION FOR A MISTRIAL

At closing argument, in response to a defense claim that the government had strong-armed its witness, Wallace Pitt, into a guilty plea, the government countered with the following statement:

> I will be brief. There has been a lot of speculation as to why some people are here and some aren't. I could spend a whole lot of time explaining to you all of that, but it's not important. Because *763 what the Judge is going to instruct you is you have to consider whether these men did these acts, not why or what happened to everybody else.
>
> But you do know some of that. I think it has been slightly misportrayed to you. Wally Pitt wasn't beaten into submission. Wally Pitt is a man. He admitted that he did something wrong. He realized after the fact that when you take 150 kilos across the country even though your brother lied to you--[Defense objection].

(J.A. at 1357).

Strube's counsel moved for a mistrial on the basis that this statement by the government constituted an impermissible reference to the fact that Strube had not testified.

We find no error in the denial of the motion. We find the statement to come within the "invited reply" doctrine enunciated in *United States v. Young*, 470 U.S.

1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). In any event, the district court gave a curative instruction.[16]

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[16] The district court's jury charge included the following instruction:

> If you find that any government witness was an accomplice to the commission of the crimes involved in this indictment, you should consider such testimony with greater caution than that of a witness who is not an accomplice.
>
> You should also consider the extent to which such testimony may have been influenced by the hope or expectation of favorable treatment from law enforcement authorities.
>
> Now you have heard testimony from government witnesses who have pled guilty to charges arising out of the same facts in this case. You are instructed that you are to draw no conclusions or inference of any kind about the guilt of these defendants on trial from the fact that a prosecution witness pled guilty to similar charges.
>
> That witness's decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendants on trial here.
>
> By that very fact, ladies and gentlemen, you may not draw any adverse inference to any defendant in this case who has not testified.
>
> Mr. Strube did not testify in this case. A defendant in a criminal case has the absolute right under our constitution not to testify. The fact that defendant Strube did not testify must not be discussed or considered by you in any way when deliberating or in arriving at your verdict. No

H. THE TWO-LEVEL ENHANCEMENT OF STRUBE'S OFFENSE LEVEL FOR POSSESSION OF A FIREARM

The district court found the total offense level for Strube to be 41 with a criminal history of III providing for a sentencing range of 360 months to life. Strube received a sentence of 360 months in contrast to the life sentence imposed on Pitt. The total offense level included a two level enhancement for the .357 caliber revolver displayed to Wallace Pitt.

The district court addressed the issue of weapon enhancement at the sentencing hearing as follows:

> Good morning. The Court will address the objections that have been filed. The first objection was to the enhancement for firearms possessions.
>
> I am fully aware of the defendant's argument. As I review the evidence, there was a delivery of cocaine at the residence of the defendant, and that Wallace Pitt was present at Mr. Strube's residence and was escorted through the house and shown the firearms.
>
> As I recall, was not Wallace Pitt a collector himself?
>
> [By counsel]: I believe that he had a firearms license, yes, Your Honor.

_____(footnote continued)

> inference of any kind may be drawn from the fact that Mr. Strube decided to exercise his privilege under the constitution not to testify.

> [The Court]: But in any event, he recalled only a few of those being antique items or collector items and that the balance were operable weapons. And I believe that under the U.S. Sentencing *764 Guidelines that those facts support an enhancement.

(J.A. at 1520).

The district judge permitted counsel to make their respective arguments regarding the objection to the firearm enhancement and then concluded:

> ... With regard to the objections, I believe that there is sufficient argument made by the defendants as to the role in the offense and will delete that two point enhancement.
>
> In all other respects, the Court adopts the factual findings and the guideline application as set forth in the first and second addendum to the presentence report in support of the enhancements.

(J.A. at 1543). The Presentence Report, describing the offense conduct, stated that Wallace Pitt, half-brother of Strube's co-defendant, Richard Pitt, drove a quantity of cocaine from Utah to Strube's home in Pennsylvania, where he met up with Richard Pitt, who had flown another quantity of cocaine from Utah to Pennsylvania. The report continues:

> Wallace Pitt told investigators that Mr. Strube took the bags of cocaine from his car and later took him on a tour of his house. Wallace Pitt said the defendant [Strube] showed him several firearms including a .357 caliber revolver. While at the defendant's house, Richard Pitt paid Wallace Pitt $5,000.

"We review the district court's factual findings in relation to sentencing issues for clear error." *United States v. Felton*, 55 F.3d 861, 864 (3d Cir. 1995) (citing *United States v. Fields*, 39 F.3d 439, 447 (3d Cir. 1994); *United States v. Miele*, 989 F.2d 659, 663 (3d Cir. 1993); *United States v. Belletiere*, 971 F.2d 961, 964 (3d Cir. 1992)). "Our review with respect to the court's application and interpretation of the Sentencing Guidelines is plenary." *Felton*, 55 F.3d at 864 (citing cases).

> Application note 3 to USSG § 2D1.1 states that
> ... The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense....

In *United States v. Price*, 13 F.3d 711, 734 (3d Cir.), *cert. denied*, 514 U.S. 1023, 115 S.Ct. 1372, 131 L.Ed.2d 227 (1995), this Court noted that "it was the risk of violence caused by the combination of firearms and drugs that merited an increase in sentence."

Although the district court here made no actual findings on the record, the court's statements quoted above implicitly recognize that the weapons shown to Wallace Pitt were "connected with the offense" and were certainly intended to indicate a potential for violence. It takes no imagination whatsoever to conclude that Strube displayed his weapons to Pitt, not so Pitt, the gun collector, could admire them, but so Pitt, the drug

courier, would clearly understand that Strube was never to be crossed. As this Court has concluded: "[the defendant's] 'arsenal' created a strong inference that he possessed these weapons in order to further the drug transaction." *United States v. Demes*, 941 F.2d 220, 223 (3d Cir.), *cert. denied*, 502 U.S. 949, 112 S.Ct. 399, 116 L.Ed.2d 348 (1991).

We find no error in the enhancement for possession of a weapon.

I. THE SUA SPONTE MOLDING OF THE JURY'S SPECIAL FORFEITURE VERDICT

Count V of the Indictment sought the forfeiture of property owned by Strube in Columbia, Pennsylvania and also $1,081,400.00 in U.S. currency, pursuant to provisions of 21 U.S.C. § 853(a) and 18 U.S.C. § 982(a)(1).

The jury returned a special verdict forfeiting $826,400.00 in U.S. currency from Pitt and an additional $255,000.00 in currency *765 from Strube along with the Strube residence. Thereafter, the district court entered a judgment with joint and several liability against both Pitt and Strube for the total forfeited sum of $1,081,400.00. Strube challenges the molding of the verdict as contrary to his right to have the jury determine the issue and amount of forfeiture. The government, building on the conviction of both Pitt and Strube on Count IV, the money laundering count, interprets the jury findings of the two sums of $826,400 and $255,000 as its determination that the entire sum the government sought to forfeit, $1,081,400, was involved in the money laundering offense and was therefore forfeitable under a joint responsibility analysis.

Fed.R.Crim.P. 31(e) provides that a special verdict shall be returned by the jury as to the extent of the interest or property subject to forfeiture where the indictment alleges such interest or property are subject to criminal forfeiture. Strube contends that the district court erred in molding the verdict to impose a forfeiture upon him in the sum of $1,081,400 rather than the sum of $255,000 set forth in the jury's verdict.

Congress has provided that, in imposing sentence on a person convicted of, among other things, an offense in violation of the money laundering statute, 18 U.S.C. § 1956, a court "shall order that the person forfeit to the United States any property ... involved in such offense." 18 U.S.C. § 982(a)(1). Pitt and Strube were both convicted as coconspirators under § 1956(h) (Count IV of the indictment). We interpret § 982(a)(1) as imposing a rule of joint and several liability in the case of a money laundering conspiracy. The statute does not say that each conspirator shall forfeit only such property involved in the offense which is or has ever been in that conspirator's possession. Rather, the statute recognizes that the amount of property involved in a money laundering conspiracy cannot be different for different conspirators.

In view of the above discussion, there is no need to reach 21 U.S.C. § 853(a)(1); however, it leads to the same conclusion with respect to forfeiture of property involved in drug-related crimes. Section 853(a)(1) provides for the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of [a qualifying drug

offense]."[17] In imposing sentence on such person, the court "shall order [] ... that the person forfeit to the United States *all property* described in this subsection." 21 U.S.C. § 853(a)(1) (emphasis added). Like 18 U.S.C. § 982(a)(1), 21 U.S.C. § 853(a)(1) imposes joint and several liability with respect to forfeiture. *See United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996) (concluding that § 853(a)(1) "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise"), *cert. denied*, 520 U.S. 1281, 117 S.Ct. 2468, 138 L.Ed.2d 223 (1997).[18]

Thus, whether under 18 U.S.C. § 982(a)(1) or 21 U.S.C. § 853(a)(1), Pitt and Strube were liable in forfeiture for the full amount of cash received by the conspiracy. The jury's special verdicts can be harmonized by interpreting them to refer to the amount that each defendant personally received. It was, therefore, proper for the trial judge to harmonize the verdicts in

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[17] Included among such offenses are those set forth in 21 U.S.C. §§ 841 and 846. Section 841(a)(1) makes it unlawful for any person to knowingly or intentionally distribute a controlled substance. Section 846 makes it unlawful for a person to conspire to distribute a controlled substance. Pitt and Strube were both convicted of such offenses.

[18] *McHan* also points to cases involving the RICO forfeiture statute, where "courts have unanimously concluded that conspirators are jointly and severally liable for amounts received pursuant to their illicit agreement." *McHan*, 101 F.3d at 1043 (citing cases).

this manner, to apply the strict *766 rule of joint and several liability that governs under both forfeiture statutes, and to enter an appropriate judgment based on this understanding.

IV. CONCLUSION

Based on the foregoing analysis, the convictions and sentences of both appellants, Richard L. Pitt and William Michael Strube, are AFFIRMED.[19]

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[19] We reject without discussion the claim that the district court erred in refusing the requests of the defendants to play, in their entirety, 25 taped conversations between Pitt and the Customs Agents Bowers and Mohle, and the claim that the government failed to comply with both the Jencks Act and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), finding both claims to be without merit.